

ORDINANCE NO. 2016-__**Amending the Historic Sites Preservation Commission and Program Ordinance**Executive Summary

The Certified Local Government Program is administered by the National Park Service and is administered in Wisconsin by the Wisconsin Historical Society. The Certified Local Government program recognizes local historic preservation commissions, such as Jefferson County's, that enforce their local historic preservation ordinance. In return, the National Park Service provides access to federal historic preservation monies in the form of grants that only Certified Local Governments may apply for. To date, Jefferson County has received \$93,000 in Certified Local Government grants to conduct historic preservation projects in the County. For Jefferson County to participate in the Certified Local Government Program, the County's ordinance must be consistent with Wisconsin Act 176. This Act provides an appeal process allowing an owner of property that is affected by a decision of the Historic Sites Preservation Commission to appeal the decision to the Jefferson County Board of Supervisors. The Board may overturn a decision of the Commission by majority vote. Jefferson County's ordinance (Ord. No. 2007-48) does not meet this statutory criterion and therefore does not meet the requirements for continued participation in the Certified Local Government Program in Wisconsin. The proposed amendments to the Jefferson County Historic Sites Preservation Commission and Program Ordinance satisfy the conditions of the Certified Local Government Program and allow Jefferson County to be eligible for Certified Local Government grants. The Historic Sites Preservation Commission met on October 20, 2016, and recommended forwarding this ordinance amendment to the County Board.

THE COUNTY BOARD OF SUPERVISORS OF JEFFERSON COUNTY DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Section 1.02(1)(e) of the Historic Sites Preservation Commission and Program Ordinance is amended as follows:

(e) Historic district is an area designated by the Jefferson County Board of Supervisors on recommendation of the commission, composed of two or more ~~improvement~~ improved parcels that together comprise a district of special character or special historic interest or value as part of the development, heritage or cultural characteristics of the County, state or nation, and which has been designated as a historic district pursuant to the provisions of this chapter.

Section 2. Section 1.02(1)(f) of the Historic Sites Preservation Commission and Program Ordinance is amended as follows:

(f) Historic structure means any improvement which has a special character or special historic interest or value as part of the development, heritage or cultural characteristics of the County, state or nation and which has been designated as a historic structure pursuant to the provisions of this chapter.

Section 3. Section 1.03(2) of the Historic Sites Preservation Commission and Program Ordinance is amended as follows:

(2) The Jefferson County Administrator shall appoint the commissioners subject to confirmation by the Jefferson County Board of Supervisors. Of the initial members so appointed, two shall serve a term of one year, two shall serve a term of two years, and three shall serve a term of three years. Thereafter, the term for each member shall be three years. The Commission shall elect its chair, vice chair and recording secretary on an annual basis.

Section 4. Section 1.05(1)(a)3. of the Historic Sites Preservation Commission and Program Ordinance is amended as follows:

3. As soon as possible after such public hearing, the Commission shall act on the nomination, either approving, modifying and approving, or disapproving of the same. If the nomination is approved, notice of the decision shall be mailed by registered or certified return receipt requested mail to the owner or owners of the structure, site or district considered. This notice shall advise the owner(s) that the Commission's decision will be forwarded to the Jefferson County Board of Supervisors for final approval and shall specify a date not less than thirty (30) days from the date of mailing by which an owner may deliver a written statement to the ~~Commissioner~~ Jefferson County Clerk that such owner ~~declines would like to appeal~~ have having the nominated property so designated. The County Clerk shall notify the County Board of Supervisors of such objection. ~~In the event an owner timely submits such a statement, the Commission shall withdraw the proposed resolution seeking final approval from the County Board.~~

Section 5. The title of Section 1.09 shall be amended as follows:

1.09 ~~SEPARABILITY.~~ SEVERABILITY.

Section 6. This ordinance shall be effective after passage and publication as provided by law.




Fiscal Note: Amending this ordinance will make Jefferson County eligible for grant funds that would otherwise not be available to the County.

Ayes _____ Noes _____ Abstain _____ Absent _____ Vacant _____

Requested by
Historic Sites Preservation Commission

10-25-16

J. Blair Ward: 07-27-16; 08-01-16; 08-22-16; 09-30-16; 09-30-16
Barb Frank: 08-23-16

REVIEWED: Administrator ; Corp. Counsel ; Finance Director 

DOJ probe leads to county meetings changes

[Nathaniel Shuda](#), USA TODAY NETWORK-Wisconsin 8:38 a.m. CDT September 22, 2016



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Winnebago County Courthouse, 415 Jackson St.(Photo: File/USA TODAY NETWORK-Wisconsin)Buy Photo

OSHKOSH - The state's top prosecuting agency will not go after Winnebago County lawmakers for violating Open Meetings laws.

After a months long investigation into claims that members of two county committees illegally attended meetings of the Courthouse Security Committee for about four years, the Wisconsin Department of Justice says it will not take any legal action.

Winnebago County Corporation Counsel John Bodnar lectured the County Board on Tuesday after receiving a July 26 letter from the DOJ that outlined the department's findings. He told supervisors to pay close attention to what committee meetings they attend and to make sure they comply with state rules about how many board members can show up to those meetings.

"If you're not a member of the committee, and you're forming a quorum of a second committee that's not noticed, you should leave," Bodnar said. "That's my advice to you. I know that's painful to some of you. You may not like it, but that's the advice we're getting from the attorney general."

Under the state's Open Meetings law, governmental bodies must provide notice to the public at least 24 hours in advance whenever half or more of its members meet to engage in governmental business. If not, any members in attendance could get slapped with fines as much as \$300 for each violation.

"It can't be paid by the county, and the insurance company won't pay that fine, either," Bodnar said.

Assistant Attorney General Paul Ferguson's letter, which USA TODAY NETWORK-Wisconsin recently obtained as part of a series of a public records requests, came five months after Winnebago County Deputy District Attorney Scott Ceman asked the DOJ to investigate what he called "systematic violations of Wisconsin's Open Meetings laws."

While county officials admitted to attending committee meetings, thereby creating a quorum of another panel, Ferguson said the department would not rule on whether actual violations occurred.

"Based on this review and on the indication that members of the governmental bodies involved are serious about ensuring compliance, DOJ believes this explanatory letter addresses the matter in an appropriate fashion," Ferguson wrote. "As such, DOJ respectfully declines to pursue an enforcement action in this matter at this time."

In response to the DOJ's letter, the county has stopped using what Bodnar called boilerplate language on its meeting agendas that states a quorum of other county committees might be present, he said. Although some might argue the statement adequately serves as a notice, Bodnar said it is better to comply with the Justice Department's interpretation of the law.

"I'm trying to keep you folks out of trouble," he said. "I'd like to tell you otherwise, and I know a lot of city attorneys and corporation counsels have their clerks post boilerplate language in the agendas, but the attorney general is giving us the advice that that's not going to work."

Supervisors also expressed concerns that some committees share more than half of the same members and that if one of the panels meet, a quorum of another committee automatically will be present. Committee chairmen also asked what they should do if a quorum of another panel shows up to their meetings.

"You would hope that they would leave," Bodnar said. "It's kind of like you're having a party and three people would crash it."

Reach Nathaniel Shuda at 920-426-6632 or nshuda@thenorthwestern.com; on Twitter: [@onwnshuda](https://twitter.com/onwnshuda).



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July 26, 2016

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Dear Mr. Ceman and Mr. Bodnar:

Please accept this letter as the Wisconsin Department of Justice's (DOJ) response to Mr. Ceman's February 23, 2016 email correspondence to DOJ Division of Legal Services (DLS) Administrator David V. Meany in which you requested DOJ investigate possible "systemic violations of Wisconsin's Open Meetings laws" in Winnebago County. This letter also serves to respond to Mr. Bodnar's June 27, 2016 letter regarding the same matter.

Mr. Ceman relayed that over approximately the last four years, the Winnebago County's Judicial Courthouse and Security Committee (JCSC) has been regularly attended by a quorum of two subcommittees of the Winnebago County Board of Supervisors (County Board): the Judiciary and Public Safety Committee (JPSC) and Facilities and Property Management Committee (FPMC). The JCSC is a courthouse security committee formed pursuant to SCR 68.05. Mr. Ceman stated that no notices or agendas for these meetings were published in advance.

Mr. Bodnar wrote that the JCSC includes both the chairperson of the County Board and the District Attorney as members pursuant to SCR 68.05(1)(b) and (f), respectively. According to Mr. Bodnar, a long-standing practice in the county is that the Circuit Court judge acting as chairperson of the JCSC appoints the chairpersons of both the JPSC and

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 2

FPMC.¹ Both the JPSC and FPMC are made up of five County Board members. The chairman of the JPSC is also a member of the FPMC, and the chairman of the FPMC is also a member of the JPSC. The County Board chairman acts as *ex officio* member of both subcommittees. According to Mr. Bodnar, both subcommittees only have the authority to make recommendations to the County Board.

Mr. Ceman stated that he spoke with Mr. Bodnar who agreed that for over four years, a quorum of both subcommittees attended the JCSC meetings without notice. This was done in accordance with Mr. Bodnar's advice that the JCSC was exempt from the requirements of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, since the JCSC was created by rule of the Wisconsin Supreme Court. Mr. Bodnar stated that this advice was largely based on a 2012 email correspondence from Assistant Attorney General Thomas C. Bellavia and a 2012 email correspondence from District Court Administrator Jon J. Bellows, relaying information provided to him by Marcia Vandercook of the State Court Operations Office. Mr. Ceman stated that he informed Mr. Bodnar that the exemption applies to the JCSC not the quorum of the JPSC and FPMC in attendance.

To resolve the alleged violations, Mr. Ceman stated that he proposed that the two subcommittees reconvene to hold the discussions and votes from the past four years with proper notice and an agenda. Furthermore, Mr. Ceman proposed that the subcommittee members should be replaced with new members from the County Board to ensure there was no "rubber-stamping" of past decisions. Mr. Ceman said it appeared that his proposed resolutions were rejected.

Mr. Ceman also wrote that, after he expressed his concern over the JCSC not posting an agenda prior to their meetings, the county adopted a boiler-plate notice on all their public notices. The boiler-plate notice essentially states that any county board subcommittee may have a quorum at any county meeting. Mr. Ceman stated that he believes this is a systemic problem.

In Mr. Ceman's letter, he also informed DOJ that Mr. Bodnar raised the issue of a potential conflict of interest with the District Attorney's Office investigating and potentially prosecuting these alleged violations. Specifically, accusations have been leveled against District Attorney Christian Gossett, who was a part of the JCSC meetings in question, that the initial investigation into this matter was for retaliatory purposes because the DA's Office does not agree with the JCSC's decisions. Mr. Ceman acknowledged that the DA's Office has a stake in this matter and that all ten attorneys in the DA's office opposed the JCSC's decision related to the expansion of the county courthouse.

As a result of this potential conflict of interest, Mr. Ceman requested that DOJ investigate. Mr. Ceman believes the issue presented is one of statewide importance for two

¹ Unlike the County Board chairperson and the District Attorney, neither of the subcommittee chairpersons are required to serve on the JCSC. In addition to requiring certain individuals to serve as members of a county's security and facilities committee, the rule permits "[s]uch other persons as the committee considers appropriate" to serve. SCR 68.05(1)(L).

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 3

reasons: (1) The JSCS expanded its membership beyond the Supreme Court mandated members to include members of other governmental bodies that could advance the JCSC's agenda without complying with the open meetings law's notice requirements; and (2) the recently adopted boiler-plate language on all notices is a means to circumvent the open meetings law, thereby allowing "county business to be conducted at random without any practical notice to the public."

Mr. Bodnar stated that the County Board subcommittee members have made a good faith effort to comply with the open meetings law, and they reasonably believed their actions complied with advice received from the Attorney General's Office. Furthermore, according to Mr. Bodnar, the Office of Corporation Counsel has made an effort to assure compliance with the law following the DA's Office's complaint. Finally, Mr. Bodnar wrote that the law in this area is not completely clear.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. See *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573-74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. See *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly a majority of the members of a governmental body constitutes a quorum. However, a negative quorum, the minimum number of a body's membership necessary to prevent action, also meets the numbers requirement. As a result, determining the number of members of a particular body necessary to meet the numbers requirement is fact specific and depends on the circumstances of the particular body.

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 4

The Wisconsin Supreme Court has held that bodies created by the Court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d81 (1976). The Supreme Court created a rule requiring the presiding judge for each county to appoint a security and facilities committee. SCR 68.05. The Supreme Court designated the composition of the committee and its tasks. *Id.* Therefore, as a body created by a rule of the Supreme Court, generally, such a security and facilities committee is not subject to the open meetings law's requirements. However, the open meetings law still applies to other governmental bodies should a sufficient number plan to attend or regularly attend a meeting of a security and facilities committee and the subject matter is within their body's realm of authority. The Supreme Court stated,

[W]hen, as here, one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a 'meeting' within the meaning of the open meeting law, unless the gathering is social or chance. We also conclude that the meetings at issue in this case were clearly not social or chance gatherings. The [governmental body's] members' attendance as a group at the . . . project meetings was a regular occurrence, with expectations among the members that at least one-half or more of their membership would be in attendance. These factors remove their attendance from the 'social or chance' gathering exception of the open meeting law. These were not social or chance gatherings. Their attendance as a group did not occur on a sporadic basis, was not haphazard, irregular, nor spontaneous. Notice of these meetings was required.

Badke, 173 Wis. 2d at 577.

Mr. Bodnar stated that the *Badke* decision concerned members of a governmental body attending a meeting of another governmental body. Mr. Bodnar believes there is confusion among members of governmental bodies as to whether *Badke* is completely applicable when members of a governmental body attend meetings of non-governmental bodies. This apparent confusion would call into question whether a violation of the law exists when members of the subcommittees attend a meeting of the JCSC, which is not subject to the open meetings law. However, this confusion is clarified when one applies the *Showers* test.

Based on the facts presented, the JCSC discusses matters within both subcommittees' realm of authority. A quorum of both the JPSC and FPMC—three members of each of the five member subcommittees—regularly attend meetings of the JCSC. As such, the members' attendance is not a social or chance gathering. Therefore, a number of members of the JPSC and FPMC sufficient to determine the bodies' actions (what recommendations to make) are present at a meeting at which the purpose is to conduct governmental business. Regardless

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 5

of whether or not the JCSC is subject to the open meetings law, based on the facts presented, the convening of members of the JPSC and FPMC at JCSC meetings meets both *Showers* test requirements. As a result both subcommittees must follow the requirements of the open meetings law, including providing proper notice of their meetings.

It should be noted that it is not the JCSC's responsibility to provide such notice and ensure such compliance with the open meetings law. Each governmental body is responsible for ensuring its compliance with the law. The chief presiding officer of a governmental body or such a person's designee is required to provide public notice of a meeting. Wis. Stat. § 19.84(1)(b). Therefore, in the scenario presented, the chief presiding officer or such person's designee for both the JPSC and FPMC would need to provide notice.

As you both know, every public notice of a meeting must give the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session. Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.* A boiler-plate notice on a particular governmental body's agenda that states that any county board subcommittee *may* have a quorum in attendance at that particular governmental body's meeting is not sufficient notice. Such a notice is not reasonably likely to apprise members of the public and the news media of the time, date, place and subject matter of a meeting because it does not provide notice of an actual meeting of a governmental body. It merely communicates the time, date, place and subject matter of a *possible* meeting of any number of governmental bodies.

In some cases, the use of boiler-plate notice is meant to balance the requirements of the law with the practical difficulties involved with governmental bodies that consist of a number of members and various subcommittees. However, as stated previously, the open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. The use of boiler-plate notices is not in keeping with the open meetings law's declaration of policy. This type of notice of a possible meeting is not the fullest and most complete information regarding governmental affairs to which the public is entitled.

Mr. Bodnar raises the question of how the subcommittees can provide proper notice for a meeting for which neither subcommittee has control over the agenda. However, the answer may be found in the JCSC and both subcommittees' shared concern with ensuring compliance with the open meetings law. For example, based on this shared concern, the JCSC and both subcommittees can work to ensure that the subcommittees are provided with an agenda prior to the JCSC meetings such that they can provide notice compliant with the open meetings law.

In a case such as the present one, separate notices for both the JPSC and FPMC are not required. A single notice may be used. However, such a notice must clearly and plainly indicate that a joint meeting will be held and give the names of each of the governmental bodies involved. The notice must also be published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved. Providing proper notice in this way is compatible with the conduct of government business.

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 6

I spoke with Mr. Bodnar regarding this matter. As he wrote in his letter, he has educated the governmental body members on the requirements of the law. Mr. Bodnar's letter indicates that the body members in this case are concerned with ensuring compliance with the law. However, Mr. Bodnar discussed the practical difficulties of managing the many members of the various governmental bodies and ensuring that they comply with the law. The bottom line is that members of every governmental body have a legal obligation to ensure compliance with the open meetings law. An unwillingness or inability to follow the law opens the body's members to the penalties detailed in the law's enforcement provisions. See Wis. Stat. § 19.97.

In his correspondence, Mr. Ceman detailed his proposed cures for any open meetings violations that occurred. The cures were for the two subcommittees to reconvene and hold the discussions and votes of the past four years anew with proper notice. Under the enforcement provisions of the open meetings law, an action taken at a meeting of a governmental body held in violation of the law is voidable, upon action brought by the Attorney General or the district attorney. Wis. Stat. § 19.97(3). "However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement [of the law] outweighs any public interest which there may be in sustaining the validity of the action taken." *Id.* A recommendation to void four years' worth of decisions is not one to be made without a thorough understanding and weighing of all relevant facts. Based on the information provided, DOJ will not make a recommendation as to how to cure any potential violation.

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available through the Wisconsin Department of Justice Office of Open Government website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). DOJ provides the full Wisconsin Open Meetings Law, maintains the Open Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

As you both know, under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints involving matters of statewide concern. DOJ has looked into this matter at Mr. Ceman's request and completed a thorough review of the information provided by Mr. Ceman and Mr. Bodnar. Based on this review and on the indication that members of the governmental bodies involved are serious about ensuring compliance, DOJ believes this explanatory letter addresses the matter in an appropriate fashion. As such, DOJ respectfully declines to pursue an enforcement action in this matter at this time.

It should be noted, for members of the general public, that if a district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving a verified complaint, the individual who filed the verified complaint may bring

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 7

an action in the name of the state. Wis. Stat. § 19.97(4). (Of course, a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

DOJ appreciates your concern for government openness and transparency and compliance with the open meetings law. We hope you share our dedication to the work necessary to preserve Wisconsin's proud tradition of open government.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

Cc: The Honorable Karen L. Seifert